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December 2, 2016

Mr. Kenneth Moraff
Office of Ecosystem Protection
U.S. Environmental Protection Agency
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Dear Mr. Moraff:

The New York State Department of State (DOS) has received your letter, dated November 4, 2016, and the accompanying draft final rule designating the Eastern Long Island Sound (ELDS) disposal site. At the same time, DOS received the Environmental Protection Agency's (EPA) response to DOS's October 3, 2016 consistency objection to the ELDS designation. In this correspondence, EPA informed DOS, for the first time, that it has modified the ELDS boundary description; EPA also asked "that NY DOS consider whether these modifications sufficiently resolve NY DOS's concerns to enable it to withdraw its objection under the CZMA."¹

Kindly be advised that DOS will not withdraw the consistency objection for several reasons. EPA has substantially changed the location and disposal site boundaries of ELDS from those described in the Proposed Rule. The ELDS described in the Proposed Rule to which DOS objected is a significantly different site than the one described in the draft Final Rule. The reconfigured ELDS has been greatly reduced in size by 35% to 1.3 nmi², however, it is still projected to receive 20 million cubic yards (mcy) of sediment, which is only an 11% reduction in the overall amount to be disposed, thus increasing the concentrations of dredged material proposed for the site by 36%. Designation and disposal at this site will have reasonably foreseeable coastal effects on New York's coastal resources, which may be different from those DOS previously identified.² Further, the new ELDS has never served as a sediment disposal site and EPA has not provided information to show its characteristics as a containment site.

The proper step would be for EPA to submit a new consistency determination for the newly configured ELDS site. Alternately, DOS can treat the coastal policy analysis at pp. 26 through 59 contained in the "EPA Response to NY DOS's CZMA Objection to EPA's Designation of the Eastern Long Island Sound Dredged Material Disposal Site" as a new consistency determination. Please let us know, and be further advised that DOS will be requesting that EPA provide additional data and information so that we can complete our consistency review.

To elaborate, EPA unilaterally changed the disposal site boundaries without coordinating with DOS during the remainder of the CZMA 90 day review period.³ The CZMA regulations at 15 C.F.R. § 930.43(d) do not authorize federal agencies to make substantial changes to a project post-objection unless

¹ Letter dated November 4, 2106 from Kenneth Moraff, Office of Ecosystem Protection, EPA to Secretary of State Rossana Rosado, New York State Department of State, (Moraff Letter) p. 2.

² See 81 FR 24750; see also ELDS Final Rule at p. 8, 13-15; EPA Response to NY DOS's CZMA Objection to EPA's Designation of the Eastern Long Island Sound Dredged Material Disposal Site (November 4, 2016) (EPA Response) at p. 15 and fn. 25.

³ See 15 C.F.R. § 930.43(d). "In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (see § 930.36(b)) to attempt to resolve their differences."



the State has suggested such changes as an alternative to the proposed project.⁴ Otherwise, the State agency must be given an opportunity to review the modification for consistency with the State's coastal policies. EPA's designation of a new ELDS containing only the undisturbed Site NL-Wa and NL-Wb in the absence of a consistency review submission to DOS for this modified project contravened the CZMA, which provides for collaboration to occur between State and federal agencies prior to, during, and after the consistency review process.⁵

EPA represented that since "[August 4, 2016], EPA has contacted NY DOS to discuss the site designation, but NY DOS has been unwilling to discuss the matter."⁶ This statement is false. EPA has neither corresponded with DOS to suggest mediation, nor reached out to Secretary of State Rosado after she issued her objection. EPA's decision to forgo coordination with DOS resulted in its unilateral modification of the final rule without further DOS review,⁷ a procedure that is not contemplated by the CZMA.⁸ EPA opted to not to seek mediation of DOS's objection and instead unilaterally devised its own solution.⁹

DOS's objection did not suggest an alternative disposal site in the eastern Sound.¹⁰ Instead, following the end of the public comment period for the April 27, 2016 Proposed Rule for ELDS, the issuance of the

⁴ See 15 C.F.R. § 930.43(e). "If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences." EPA is proceeding with an alternative it chose post-objection. This alternative was not identified in the July 20, 2016 consistency determination and was not reviewed by DOS for consistency.

⁵ See 15 C.F.R. §§ 930.34, 930.36(a) and (b) and 930.39(a). See also 15 C.F.R. § 930.43(d):

In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (see § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless:

(1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or

(2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

⁶ EPA Response at p. 17.

⁷ "Under these circumstances, EPA has decided that the most reasonable course of action requires finalization of the Proposed Rule rather than pursuit of the above-mentioned mediation opportunities through the Department of Commerce." EPA Response at p. 16.. In the EPA Response (at p. 16), EPA asserts that "EPA personnel attempted to initiate discussions with NY DOS during August and September 2016 regarding potential modifications to the Proposed Rule that EPA was considering in light of public comments, but, as mentioned farther above, NY DOS would not discuss the matter with EPA."

⁸ See 15 C.F.R. §§ 930.43(d). "In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences."

⁹ See 15 C.F.R. § 930.43(e). See Moraff Letter at p. 2. "Since [August 4, 2016], EPA has contacted NY DOS to discuss the site designation, but NY DOS has been unwilling to discuss the matter with EPA. Under these circumstances, EPA has decided not to pursue mediation through the Department of Commerce."

¹⁰ See DOS objection letter dated October 6, 2016 finding the EPA's proposal to site one or more open water disposal sites in eastern LIS to be inconsistent with the Long Island Sound Coastal Management Program enforceable coastal policies.

July 18, 2016 draft Supplemental Environmental Impact Statement, and DOS's October 3, 2016 consistency objection, EPA alone reviewed the public comments and other relevant developments (which EPA has failed to provide the details of) leading it "to make certain noteworthy changes to the proposed action"- changes that were unanticipated and potentially environmentally harmful.

Accordingly, EPA's request that DOS accept the ELDS rulemaking modifications by "withdrawing" its October 6, 2016 objection is denied. Instead, DOS is hereby notifying EPA that it is required to submit a consistency determination pursuant to 15 C.F.R. § 930.34(a) to allow DOS to determine if this modified federal agency activity is consistent with the enforceable coastal policies of the Long Island Sound Coastal Management Program and the Town of Southold Local Waterfront Revitalization Program.

Please contact Jeffrey Zappieri at (518)473-2476 with any questions and to coordinate the EPA's consistency determination submission.

Sincerely,



Sandra Allen
Deputy Secretary of State
Office of Planning and Development

c (by email): Col. Christopher J. Barron, USACE
David Kaiser, NOAA
Kathleen Moser, NY DEC
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